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No. 86-497 and 86-531

In the Supreme Court of the United States

October Term, 1986

AGENCY HOLDING CORPORATION, ET AL.,
Petitioners

vs.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent

CROWN LIFE INSURANCE COMPANY, ET AL.,
Petitioners

vs.

MALLEY-DUFF & ASSOCIATES, INC.,
Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Brief For Petitioners Crown Life Insurance Company and Clarke Burton Lloyd

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HIPP

QUESTIONS PRESENTED

PARTIES TO THE PROCEEDINGS

Petitioners, Crown Life Insurance Company and Clarke Burton Lloyd, were Appellees below on the issues presented for review.[1]

Clarke Burton Lloyd is an individual, a Canadian citizen and a resident of Chicago, Illinois. Respondent, Malley-Duff & Associates, Inc., was Appellant below on the issues for review. Malley-Duff & Associates, Inc. is a Pennsylvania corporation which has its office in Pittsburgh, Pennsylvania.

Crown Life Insurance Company is a partly owned subsidiary of Crownx, Inc., which has its headquarters in Toronto, Ontario, Canada. The following are nonwholly owned subsidiaries of Crown Life Insurance Company: Crown Financial Management Limited with headquarters in London, United Kingdom; Crown Eagle Life Insurance Company Limited with headquarters in Jamaica; and Crown Life Carribean Limited with headquarters in Trinidad, Tobago.

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[1]The other parties who were Appellees below were Agency Holding Corporation, an Illinois corporation, Agency Holding Corporation, an Ohio corporation, Kerry Patrick Craig, Diane Pariano, Erhman Ratini Oglevee and Craig, Inc., a Pennsylvania corporation, and Robert Oglevee.

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The opinion of the Court of Appeals (Joint Appendix, hereinafter referred to as "A" p. 70) is reported at 792 F.2d 341. The District Court's ruling granting the Petitioners' motion for summary judgment is not officially reported, but is provided in the Appendix (A 56).

JURISDICTION

The judgment of the Court of Appeals was entered on May 30, 1986. Petitioners filed a timely petition for rehearing under Federal Rules of Appellate Procedure 35(b) and 40(a). On July 1, 1986, the petition was denied (A 104). Petitioners filed a timely petition for Writ of Certiorari on September 29, 1986. The petition was granted on December 1, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968, provides in relevant part:

> Any person injured in his business or property by reason of violation of Section 1962 of this chapter may sue therefor in any appropriate United States District Court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Id. at § 1964(c).

> (a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has

participated as a principal within the meaning of Section 2, Title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern of racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b) or (c) of this section.

Id. at § 1962.

The relevant Pennsylvania statute of limitations, 42 Pa.Con.Stat.Ann. § 5524 provides:

> The following actions and proceedings must be commenced within two years:
>
> (1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.
>
> (2) An action to recover damages for injuries to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.
>
> (3) An action for taking, detaining or injuring personal property, including actions for specific recovery thereof.
>
> (4) An action for waste or trespass of real property.
>
> (5) An action upon a statute for a civil penalty or forfeiture, where the action is given to a government unit.
>
> (6) An action against any officer or any government unit for the nonpayment of money or the nondelivery of property collected upon on execution or otherwise in his possession.

The catchall statute of limitations provision, 42 Pa.Con.Stat.Ann. § 5527 provides:

> The following actions and proceedings must be commenced within six years:
>
> . . .

> (6) Any civil action or proceeding which is neither subject to another limitation specified in this subchapter nor excluded from the application of a period of limitation by section 5531 (relating to no limitation).

STATEMENT OF THE CASE

Malley-Duff & Associates, Inc. ("Malley-Duff"), a Pennsylvania corporation, was general agent in the Pittsburgh area for petitioner, Crown Life Insurance Company ("Crown"), a Canadian corporation engaged in the business of selling life, health and accident insurance, under a general agency contract which contained the following provision:

> This agreement may be terminated on one month's notice by either party and such notice will be deemed to be given when a registered letter containing the notice is mailed, addressed to the party entitled to the notice at the party's last known address.

Under date of January 11, 1978, petitioner, Crown, wrote by registered mail to Malley-Duff giving notice of termination pursuant to the above quoted provision, effective one month from the date of mailing the letter. On February 10, 1978, Malley-Duff brought suit in equity in the Court of Common Pleas of Allegheny County, Pennsylvania, against Crown and Clarke Burton Lloyd, then its Vice President for United States Agencies, seeking to enjoin the termination of the agency contract, and by motion dated February 10, 1978, asked for a preliminary injunction. A hearing on the motion was held before Judge (now Justice) Flaherty on February 15 and 16, 1978, and after the submission of Briefs, Judge Flaherty entered an Order dated February 22, 1978, stating, " . . . the motion

for preliminary injunction is herewith refused." Thereafter, Crown filed a Preliminary Objection asserting the availability of an adequate, nonstatutory remedy at law, and asking that the case be transferred to the law side, but this objection was never brought on for argument. The plaintiff has permitted the equity suit to remain dormant.

On April 5, 1978, Malley-Duff filed an action in federal court (*Malley-Duff I*) against the present Petitioners and the Crown general agents in Chicago and Cleveland, and an individual, Kerry Patrick Craig ("Craig"), complaining about the selfsame termination of its general agency contract with Crown Life, this time setting forth eight counts (Civil Action No. 78-373-W.D.Pa.). This action asserted claims under the federal antitrust laws for conspiracy and monopolization and under the common law of Pennsylvania for breach of contract, malicious interference with the contract, conspiracy or concerted refusal to deal, and for punitive damages.

Between April 5, 1978, and March 20, 1979, Malley-Duff engaged in discovery involving, inter alia, extensive requests for production of documents and ten depositions. During the deposition of Diane Pariano on November 21, 1978, Malley-Duff's counsel questioned her at length about the shredding of documents in Agency Holding's Chicago office, which Malley-Duff now claims constituted an obstruction of justice and part of its RICO injury. Malley-Duff also claims that Miss Pariano's testimony, at the deposition, was an instance of perjury which it refers to in its complaint as a predicate act. On December 10, 1978, Mrs. Kenneth Backhus testified that she observed the shredding of documents in the Chicago office of Agency Holding. In addition, Malley-Duff became aware in December, 1978, of the alleged obstruction of justice involving the hiding of

secretary/receptionist Miss Marie Beemsterboer from a United States Marshal—an incident which Malley-Duff also asserts caused it RICO injury.

A five-week trial began on March 8, 1983. At the conclusion of plaintiff's evidence, a directed verdict was granted by the trial court in favor of all of the defendants on each of the counts asserting a violation of the antitrust laws and the count charging breach of contract. The other common law claims were permitted to go to the jury. The jury found that there was no liability for tortious interference with a contractual relation and no liability for a conspiracy with the intent to injure, and refused to assess punitive damages. Some of the defendants, namely Crown, Lloyd and Craig, were found to be liable in the amount of $900,000 on a theory of conspiracy to tortiously interfere with a contract.

All parties appealed to the Court of Appeals for the Third Circuit. On May 7, 1984, that Court reversed the trial court, reinstated the antitrust counts and ordered a new trial, overturning the jury verdict against the defendants. *Malley-Duff & Associates, Inc. v. Crown Life Insurance Company, et al.*, 734 F.2d 341 (3rd Cir. 1984). A Petition for Certiorari to the United States Supreme Court was filed timely. The Petition was denied.

Meanwhile, on March 20, 1981, Malley-Duff had commenced this second action against Crown, Lloyd and various other defendants (*Malley-Duff II*). Malley-Duff alleged violations of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. §§ 1961-1968 (Supp. 1970-83) ("RICO"), the Civil Rights Act, 42 U.S.C. § 1985 and the common law of Pennsylvania, based upon alleged acts of some defendants during and in connection with the litigation of *Malley-Duff I*. *Malley-Duff I* and *Malley-Duff II*

were consolidated for discovery purposes, but prior to the date set for trial, the Court severed the two actions, and *Malley-Duff I* was tried alone.

Following the trial of *Malley-Duff I*, on March 23, 1984, the District Court granted defendants' motion for summary judgment on all federal law counts in *Malley-Duff II* and dismissed the state law claims (A 56-68). Malley-Duff appealed from that order. On May 30, 1986, a panel of the Court of Appeals for the Third Circuit reversed the District Court's grant of summary judgment on the RICO claims, as well as most of those under § 1985(2), and reversed the dismissal of the pendent state claims (A 70).

Crown Life Insurance Company and Clarke Burton Lloyd filed a timely petition for rehearing pursuant to Federal Rules of Appellate Procedure 35(b) and 40(a). On July 1, 1986, the petition was denied (A 104). On September 29, 1986, Crown Life Insurance Company and Clarke Burton Lloyd filed a timely petition for writ of certiorari, which petition was granted on December 1, 1986.

STATEMENT OF THE FACTS

During the years immediately prior to the decision to terminate Malley-Duff, the production of that agency had leveled off. This leveling of production occurred at a level just in excess of Five Million ($5,000,000) Dollars annually. That figure represents the threshold at which a Crown general agent is rewarded with an increased bonus, in addition to regular commissions, the increased bonus being computed on the entire $5,000,000, as well as on any additional production. The production level regularly attained by Malley-Duff indicated that once this threshold was attained and the increased bonus on past production

received, no further effort was expended. Malley was no longer willing to devote the time and effort necessary to increase the Agency's production. Duff wanted to buy Malley's interest in the agency, but putting more business on the books would only have raised the net worth of the agency and, hence, the price of Malley's interest. The result was a standoff. Crown recognized this fact and urged Malley-Duff to increase its penetration in the Pittsburgh market. These requests went unheeded. Crown had repeatedly warned Malley-Duff that its representation of Crown in the Pittsburgh market had been grossly inadequate. Despite these warnings, Malley-Duff's production continued to lag.

On August 19, 1977, confirming an earlier conversation, defendant Lloyd, wrote Malley-Duff and set forth a standard of production that was expected of Malley-Duff in order to retain its status as the Crown Life general agent in Pittsburgh. This warning was repeated by letter two months later. Malley-Duff failed to improve its marketing efforts. Lloyd recommended that Malley-Duff be terminated as general agent. This recommendation was adopted by senior management. On January 11, 1978, Crown wrote to Malley-Duff giving notice of its intent to terminate Malley-Duff as its general agent in Pittsburgh pursuant to the express provisions of the general agency contract. Upon the request of Malley-Duff, the termination was reconsidered by Crown but Lloyd's superiors, Michael Hutchison, Marketing Vice President of Crown, and Robert Dowsett, President of Crown, adhered to their decision to terminate Malley-Duff. Termination became effective on February 11, 1978.

SUMMARY OF ARGUMENT

A. In *Wilson v. Garcia*, 471 U.S. 261 (1985), this Court reasserted the federal interest in uniformity and the interest in having firmly defined, easily applied rules for statutes of limitations for federal claims. This Court identified the essence of all 1983 claims as being claims for personal injury. Congress provided the Court with an accurate characterization of the essence of claims under RICO's civil enforcement provisions when it stated that those who could seek relief were those who were injured in their business or property by reason of a violation of Section 1962. The simplicity and merit of looking at the injury or the interests protected rather than at the particular facts or precise legal theories was recognized in *Wilson v. Garcia, supra*. Following that principle this court should hold that a state's statute of limitations for a claim for injury to business or property should apply to all civil RICO claims. For cases arising in Pennsylvania the statutory period is two years.

B. Because Malley-Duff, contrary to the averments in its complaint, has now admitted that there was no pattern of racketeering activity or conspiracy in existence at the time it was terminated as general agent for Crown Life, this court should hold that it can have no RICO cause of action for that injury. If Malley-Duff, contrary to its prior admissions, now alleges that a conspiracy had begun prior to its termination, the statute of limitations began to run at the time of the termination injury for any recovery for this injury, and not at some later date when other alleged predicate acts occurred.

ARGUMENT

I. The State Statute of Limitations most analogous to a claim for injury to business or property should be applied to all civil RICO claims.

A. The Rackateer Influenced and Corrupt Organizations Act ("RICO") 18 U.S.C. § 1961-1968 (1982 & Supp. II 1984) does not contain a specific statute of limitations governing RICO actions. When Congress has not established a time limitation for a federal cause of action, the settled practice has been to adopt a local time limitation as federal law if it is not inconsistent with federal law or policy to do so. *Wilson v. Garcia*, 471 U.S. 261, 266 (1985). This case involves the selection of the "most appropriate" or "the most analogous" state statute of limitations to apply to this RICO claim.

In *Wilson v. Garcia* this Court said that in order to determine the "most appropriate" or "most analogous" state statute, three questions must be answered.

> 1. First, whether the state law or federal law governs the characterization of a § 1983 claim for statute of limitation purposes.
>
> 2. If a federal law applies, should all § 1983 claims be characterized in the same way or should they be evaluated differently depending upon the varying factual circumstances and legal theories presented in each individual case.
>
> 3. A court must characterize the essence of the claim in the pending case and decide which state statute provides the most appropriate limiting principle.

Although the opinion in *Wilson v. Garcia* referred extensively to § 1988 of the Reconstruction Civil Rights

Acts, the language of that section appears to be a restatement of what courts should do in every case where there is a federal act that contains no specified statute of limitations. RICO, with its enumerated predicate acts, is so like the numerous rights for which protection has been sought under § 1983, that the three-step test established in *Wilson v. Garcia* is appropriate for an analysis of this case.

It seems clear that the matter of characterization of the claim should be treated as a federal question. The characterization "is ultimately a question of federal law". *Autoworkers v. Hoosier Cardinal Corp.*, 383 U.S. 696, 706 (1966). Only the length of the limitations period and closely related questions of tolling and application are to be governed by state law. *Johnson v. Railway Express Agency Inc.*, 421 U.S. 454, 464 (1975). In *Wilson v. Garcia*, there was a conflict with the ruling of the New Mexico Supreme Court as to which statute of limitation should apply but there is no such conflict in this case.

Section 1983 was characterized as a "uniquely federal remedy against incursions under the claimed authority of state law upon rights secured by the Constitution and laws of the Nation." *Wilson v. Garcia, supra.* at 271-272, *quoting Mitchum v. Foster*, 407 U.S. 225, 239 (1972). Most of the federal district and circuit courts which have considered civil RICO actions since *Wilson v. Garcia* have held that it applies to RICO cases whether or not RICO is deemed to be a "uniquely federal remedy."[2] Certainly

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[2]In addition to the Third Circuit, other courts have found that the reasoning of *Wilson v. Garcia* justifies the application of a single state statute of limitations period for all civil RICO causes of action. *Tellis v. United States Fidelity & Guarantee Co.*, 805 F.2d 741 (7th Cir. 1986); *Hunt v. American Bank & Trust Co.*, 783 F.2d 1011 (11th Cir. 1986) (dicta); *Davis v. A.G. Edwards & Sons, Inc.*, 635 F. Supp. 707 (W.D. La.

(Continued on next page)

there were no RICO laws in any of the states before the enactment of the federal RICO law, and in many of the so called state RICO statutes, there is no private civil remedy. States could have enacted civil rights acts which parallel the federal acts and in such cases could rely on the state constitution as well as the federal constitution in granting remedies.

When addressing the question, whether all federal Civil RICO claims should be characterized in the same way for limitations purposes, it is important to keep in mind the practical considerations and the statute's remedial purpose, both of which favor a simple broad characterization of all civil RICO claims. The experience of the courts that have predicated their selection of a statute of limitations upon an analysis of the particular facts of each claim, whether in RICO or in § 1983 claims, demonstrates that their approach inevitably breeds uncertainty and time-consuming litigation. If almost every § 1983 claim can be favorably analogized to more than one of the ancient common-law forms of action, each of which may be governed by a different statute of limitations, the history of RICO litigation is at least as confusing. If the choice of the statute of limitations were to depend upon the particular facts, predicate acts, or the precise legal theories alleged in each claim, counsel could almost always argue that two or more periods of limitations should apply to each RICO claim.

This is particularly apparent in this case in which an action based on tortious interference was filed by Malley

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(Continued)
1986); *Argosy v. Bradley*, 628 F. Supp. 1359 (D. Utah 1986); *Morley v. Cohen*, 610 F. Supp. 798 (D. Md. 1985); *Victoria Oil Co. v. Lancaster Corp.*, 587 F. Supp. 429 (D. Colo. 1984).

Duff almost three years before its RICO action was filed. By creative pleading, the same injury described in the prior case was characterized as mail fraud in the present case in order to place it under one of the prescribed predicate acts of § 1961. The basic injury remained the same, tortious interference with the business of Malley-Duff. So long as the courts look to the pleadings and the facts rather than to the injury or interests protected there will always be the type of uncertainty which breeds unnecessary litigation. It is unlikely that Congress actually foresaw the wide application of RICO to many of the types of claims that now comprise at least 90% of its cases.[3] Certainly Congress intended the identification of the appropriate statute of limitations to be an uncomplicated task for judges, lawyers, and litigants, rather than a source of uncertainty and unproductive and ever increasing litigation.

Uniformity within each state is entirely consistent with the borrowing principle followed when there is no federally specified statute of limitation. "The federal interest in uniformity, certainty, and the minimization of unnecessary litigation all support the conclusion that Congress favored this simple approach." *Wilson v. Garcia*, 471 U.S. at 270.

The third step requires that the court characterize the essence of the claims. The Court of Appeals in *Wilson v. Garcia* had exhaustively reviewed the different ways that § 1983 claims had been characterized before concluding that the tort action of recovery for personal injuries is the best alternative available. *Id.* at 276-278. This Court agreed and held that one staute of limitations should apply to all § 1983 claims. This uniform approach was possible

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[3]Sedima, S.P.R.L. v. Imrex. Co., ___ U.S. ___, 105 S. Ct. 3275, 3287 n. 16 (1985)

because this Court looked not to the causes of injury but to the nature of the injury in characterizing the essence of § 1983 claims.

An analysis of the RICO act for the essence of civil RICO causes of action requires no exhaustive review. Section 1964(c) of RICO provides pertinently that "any person injured in his business or property by reason of a violation of § 1962 of this chapter may sue therefor . . . ." When characterizing the essence of civil RICO by focusing on the nature of the injury and interests protected, rather than the facts and circumstances or legal theories, it is clear that the nature of the civil RICO remedy is to confer a remedy for injury to business or property.[4] The characterization of all RICO actions as involving claims for injuries to business or property minimizes the risks that the choice of a state statute of limitations would not fairly serve the federal interests protected by RICO.

The relevant Pennsylvania statute of limitations, 42 Pa.Con.Stat.Ann. § 5524 provides:

> The following actions and proceedings must be commenced within two years:
>
> (1) An action for assault, battery, false imprisonment, false arrest, malicious prosecution or malicious abuse of process.
>
> (2) An action to recover damages for injuries to the person or for the death of an individual caused by

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[4]In this case, the Third Circuit went astray when it said "Clearly, we should not expect an epiphany through which the 'essence' of civil RICO is revealed to us." (A 89) Instead of characterizing the essence of the claim it looked in vain for a statute of limitations that would cover every possible RICO theory and, finding none, opted for the catch-all statute.

the wrongful act or neglect or unlawful violence or negligence of another.

(3) *An action for* taking, detaining or *injuring personal property*, including actions for specific recovery thereof.

(4) *An action for* waste or *trespass of real property*.

(5) An action upon a statute for a civil penalty or forfeiture, where the action is given to a government unit.

(6) An action against any officer or any government unit for the nonpayment of money or the nondelivery of property collected upon on execution or otherwise in his possession. (Emphasis supplied.)

The gravamen of Malley-Duff's Complaint is that its business was injured by the termination of its agency agreement with Crown.

Personal property, as defined in Pennsylvania is "everything except real estate," *McGlathery's Estate*, 311 Pa. 351, 354, 166 A. 886, 887 (1933), and includes intangible personal property. *Home for Crippled Children v. Erie Insurance Exchange*, 130 P.L.J. 480 (C.P. Alleg. 1982), *aff'd. mem.* 329 Pa. Super. 610, 478 A.2d 84 (1984) (analyzing the present relevant statute and holding that tortious interference with a contractual relationship is controlled by the two-year statute). Accordingly, personal property includes a business. In fact, the Third Circuit itself adopted the reasoning of *Home for Crippled Children* and held that the two-year statute of limitations period applied to a claim for tortious interference with employment contracts. *Mazzanti v. Merck & Co.*, 770 F.2d 34, 36 (3rd Cir. 1985). In addition, § 5524(4) provides a two-year period for tortious conduct affecting real estate. A more

appropriate statute of limitations period cannot be found under Pennsylvania law.

Although, as the Third Circuit pointed out, Section 5524 might not apply to all of the predicate acts, it would apply to any trespass against business or property encompassed by 18 U.S.C. § 1964(c). Tortious interference with business or property is the evil against which the Congress enacted RICO and provided a protective civil remedy.

If the courts are to limit an unfettered use of the RICO statute in cases not involving organized crime, it would be most appropriate to apply the same state statute which is used in a claim for injury to business or property. In Pennsylvania, § 5524(3) and (4) are specifically concerned with providing protection against tortious interference with businesses or other property. A two-year limitation would not be contrary to the federal mandate. In fact, it would indeed be strange to find that a two-year statute of limitations would apply in the case of a common law claim for tortious interference with a business relationship, but that a claim for the same tortious interference with the same business relationship would have a six-year statute of limitations because it was framed as a RICO violation.

The application of this limitations period is in no way inconsistent with the underlying policies or remedial purposes of RICO. Arising on essentially the same factual allegations as respondent's tortious interference with business claims alleged in *Malley-Duff I*, the timeliness of respondent's RICO claims also should be judged by the same two-year statute of limitations.[5]

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[5]The statute of limitations for tortious injury to property, real or personal, is at least two years in every state except Louisiana where it is one year.

B. Even if a particularized approach to the statute of limitations for RICO claims were to be adopted, the most appropriate and most analogous Pennsylvania statute of limitations in this case is the two-year statute for tortious injury to personal property. Should the Court decide to look at the facts alleged and legal theories asserted in order to characterize the cause of action most closely analogous, it should reach the same result. It should be noted in this context that the Third Circuit was factually incorrect when it stated that the parties agreed that common law fraud was the most analogous state cause of action to the present RICO claim. (A 76) (See, Brief of Crown and Lloyd to the Third Circuit, p. 15-16.)

As stated in A. above, the gravamen of Malley-Duff's Complaint in this action, as it was in *Malley-Duff I*, is that its business was injured by the termination of its agency agreement with Crown. Although proof of respondent's RICO claim may require proof of certain elements beyond those required to establish common-law tortious interference, no closer analogy is available under Pennsylvania law. Under Pennsylvania law, as set forth in section A. above, there exists a two-year statute of limitations period for any action concerning injury to one's business or property, real or personal.

C. There are no Federal policies or laws which should cause this Court to turn away from the norm of borrowing the state's limitations periods for injury to business or property. Judge Sloviter, in her concurrence in a case that was consolidated with this case for argument below, *A. J. Cunningham Packing Corp. v. Congress Financial Corp.*, 792 F.2d 330, 338-341 (3d Cir.1986), would have looked to the four-year statute of limitations in the Clayton Act, 15 U.S.C. § 15b.

This statute of limitations was added to the original Clayton Act in 1955. On at least three subsequent occasions, however, a proposed act or proposed amendments to RICO which would have inserted a specific statute of limitations were rejected or withdrawn. See Senator Hruska's proposed S.1623 submitted in 1969 (115 Cong. Rec. 6995-6996); Representative Steiger's proposed amendment to S.30, the Organized Crime Control Act of 1970. (116 Cong. Rec. 35227-35228, 35346-35347); and, S.16, the Civil Remedies for Victims of Racketeering Activity and Theft Act of 1972, which would have amended Section 1964 of RICO (118 Cong. Rec. 29368).

Although the section providing for civil causes of action in RICO began with language similar to a like section of the Clayton Act, the nature of the private causes of action under the two sections differ widely. The Clayton Act has no section analogous to § 1961 of RICO which sets forth the predicate acts on which a pattern of racketeering activity must be based. Most, if not all, RICO cases have been brought to recover for injury caused by the predicate acts. *Sedima* rejected the concept of requiring a special "racketeering injury." By contrast, a private action under the Clayton Act requires an "antitrust injury." Accordingly, the apparent similarity in the civil remedy provisions of RICO and the Clayton Act belie the fundamental differences between them.

Had RICO been held to require a prior criminal conviction before a civil action could be brought, then a lengthy limitations period might have been appropriate. But when all that is required is proof of at least two predicate acts that establish a pattern, there is no federal policy which would require a limitations period in excess of that given by each state for the most analogous cause of action.

Judge Sloviter noted in *A. J. Cunningham Packing Corp. v. Congress Financial Corp., supra.* at 341, that if state law were to be applied, the most appropriate statute to apply, at least for claims accruing after 1983, is the two-year limitations period for actions seeking redress for most tortious behavior, § 5524, *supra.* Her caveat as to post 1983 claims may have been because there was a question between 1978 and 1983 relating to the statute of limitations for common law fraud in Pennsylvania. There is, however, no question that the Pennsylvania statute of limitations for injury to business or property was two years at all the relevant times in this case.

II. RICO does not provide a civil remedy for a person allegedly injured by a predicate act when as that person admits there was no pattern of racketeering activity and there was no conspiracy in existence at the time of injury.

In Count I of its Complaint, Malley-Duff alleged that on or before January 1, 1976, defendants Lloyd, Craig and Crown associated themselves as an enterprise, the purpose of which was to acquire, takeover and eliminate various Crown agencies that had lucrative territories in the United States. (Paragraph 18) (A 7).

It stated that the enterprise affected interstate commerce through its acquisition and maintenance of Crown agencies in Pittsburgh, Erie, Chicago, Peoria, Toledo, Cleveland, Newark, Hartford, Denver and elsewhere. (Paragraph 19) (A 8).

The Complaint alleged that the defendants conspired to conduct the enterprise's affairs through various acts of racketeering which included acquiring various Crown agencies, including plaintiff's, by false and fraudulent

means and pretenses through use of mail and wire communication. (Paragraph 21(a)) (A 8).

Another alleged act of racketeering was to cause renewal commissions to be transferred from the plaintiff to one or more of the defendants. (Paragraph 21(d)) (A 9).

It further said that through acts similar to those averred in subparagraphs (a)-(d), defendants acquired Crown agencies and defrauded and terminated general agents out of renewal commissions in Chicago, Peoria, Cleveland, Newark, Hartford, Denver and elsewhere. (Paragraph 21(e)) (A 9).

In paragraph 21(f) of its Complaint, respondent alleged obstruction of justice in connection with discovery in *Malley-Duff-I* which included destroying documents requested in that lawsuit and obstructing a United States Marshal in the performance of his duties as well as suborning perjury of witnesses deposed by plaintiff in *Malley Duff I*.[6]

Count I alleges a violation of 18 U.S.C. § 1962 (d). Other counts incorporate the averments of Count I by reference and allege violations of § 1962(a)(b) and (c).

At least as early as the state court preliminary injunction hearing, which was held before Judge, now Justice, Flaherty on February 15th and 16th, 1978, Malley-Duff knew that Craig had been, since September, 1977, President of Agency Holding of Illinois, the Crown Life general agent for Chicago and most of the state of Illinois, and that he had been Vice President and had an ownership interest

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[6]District Court Judge Alan N. Bloch specifically charged the jury in the trial of *Malley Duff I* that there was no evidence connecting Crown or Lloyd with the destruction of any evidence (Trial Transcript of April 14, 1983, p. 3264).

in the Crown Life General Agency in Cleveland, Ohio, from approximately the same time. Malley-Duff also knew, at least from the time of that hearing, that Agency Holding Corporation of Illinois had been the General Agency for Crown Life for the state of Illinois since March, 1977, replacing the previous general agent.

In the lengthy trial of *Malley Duff I* in which similar allegations as to non-payment of renewal commissions were made, respondent's counsel agreed that it had presented no evidence of failure to pay the proper vested renewals and that issue did not go to the jury.

A. The summary judgment that was awarded to petitioners by the District Court judge in this case was based on a two-year statute of limitations. In order to avoid the holding that its claim for termination in Pittsburgh was time-barred, Malley-Duff, in its Brief before the Third Circuit as well as at oral argument, argued that no cause of action had accrued under RICO on or before the termination of its Agency.

> . . . [T]he District Court erred by computing the statute of limitations from a date which preceded the existence of a cause of action under RICO. The trial court inexplicably segregated plaintiff's RICO claims into the constituent acts of racketeering, which injured Malley-Duff, i.e., the mail fraud resulting in Malley-Duff's termination and the obstructions of justice (Footnote 12). It then applied the statute of limitations not to Malley-Duff's RICO claim, but to the first racketeering activity, mail fraud, as if plaintiff were suing directly under 18 U.S.C. § 1341.

Malley-Duff Brief to the Third Circuit, p. 32.

> When defendant fraudulently terminated plaintiff, *no RICO cause of action existed since there were no multiple acts of racketeering.*

Id. at 33-34 (Emphasis added).

> Such computation anomalously caused the statute of limitations to begin *before a cause of action existed under RICO.*

Id. at 34. (Emphasis added).

> At a minimum, the statute of limitations for a RICO claim cannot commence until the cause of action has accrued.

Id. at 34-35.

> Ignoring the requirement of a pattern of racketeering activities, the court assumed that Malley-Duff could have brought a RICO claim immediately after its fraudulent termination, *the first predicate act.*

Malley-Duff Supplemental Brief, p. 2. (Emphasis added).

> As noted above, and in Appellant's principal Brief, the District Court inexplicably seized upon Malley-Duff's mail fraud allegations as if plaintiff could have commenced a RICO action at the time of its termination. Judge Bloch computed the statute of limitations from that date *even though no cause of action under RICO had accrued.*

Id. at 8 (Emphasis added).

All of the above admissions of Malley-Duff were made in its Briefs to the Third Circuit on the summary judgment issue. The inability of respondent to identify predicate acts other than the August 1977 letter, in connection with its termination, or predicate acts in the acquisition of the general agencies in Chicago and Cleveland, both of which

agencies were acquired by Craig prior to its termination, underscores the frivolousness of Malley-Duff's RICO claim.

Subsections (a), (b), and (c) of § 1962 of RICO all require a "pattern of racketeering activity." At Footnote 14 of *Sedima, supra*, page 3285, this Court said:

> As many commentators have pointed out, the definition of a "pattern of racketeering activity" differs from the other provisions in § 1961 in that it states that a pattern "*requires at least two acts of racketeering activity,*" § 1961(5) . . . The legislative history supports the view that two isolated acts of racketeering activity do not constitute a pattern. As the Senate Report explained: "The target of [RICO] is thus not sporadic activity. The infiltration of legitimate business normally requires more than one 'racketeering activity' and the threat of continuing activity to be effective. It is this factor of *continuity plus relationship* which combines to produce a pattern." (Emphasis added).

Section 1964 of RICO states, in pertinent part:

> Any person injured in his business or property *by reason of a violation of Section 1962 of this chapter* may sue therefor in any appropriate United States District Court . . . (Emphasis added).

Since *Sedima*, a number of courts have attempted to take a fresh look at what constitutes a pattern. Because RICO requires a minimum of two predicate acts, under even the most liberal of these new concepts of pattern, one admitted predicate act cannot constitute a pattern.

One concept of pattern recognizes that a "pattern" connotes a multiplicity of events:

> Surely the continuity inherent in the term presumes repeated criminal *activity*, not merely repeated *acts* to carry out the same criminal activity. It places a real strain on the language to speak of a single fraudulent effort, implemented by several fraudulent acts, as a "pattern of racketeering activity."

Northern Trust Bank/O'Hare v. Inryco, Inc., 615 F. Supp. 828, 831 (N.D. Ill. 1985) (Emphasis in original).

The *Inryco* court suggested that a pattern requires more than a single scheme, *Id.* at 833, and, like *Sedima*, emphasized the "continuity plus relationship" concept.

In *Superior Oil Co. v. Fulmer*, 785 F.2d 252 (8th Cir. 1986), the Eighth Circuit also adopted the *Inryco* position that several predicate acts comprising one continuing scheme was insufficient to constitute a pattern, especially when there was no proof that the defendants had ever done these activities in the past, or that they were engaged in criminal activities elsewhere. *Id.* at 257.

Put simply, subsections 1962(a), (b) and (c) require, at a minimum, two predicate acts. This Court said, ". . . [T]he compensable injury necessarily is the harm caused by predicate acts sufficiently related to constitute a pattern. . . ." *Sedima*, 105 S. Ct. at 3286. Because there had been only one alleged predicate act at the time Malley-Duff's agency agreement was terminated, its business had not been injured by a *pattern of racketeering activity* and, therefore, Malley-Duff can have no RICO cause of action under subsection (a), (b) or (c).

Alleged acts that occurred after the termination do not give Malley-Duff a RICO cause of action under subsection

(a), (b) or (c) for the alleged injury that occurred on February 11, 1978. A *cause* of a RICO injury (a pattern of racketeering activity) can not be preceded by its *effect* (a RICO injury).

B. It is quite clear from the admissions made by Malley-Duff in its Brief to the Court of Appeals that no pattern of racketeering activity which would have given it a cause of action under subsections (a), (b) or (c) of 1962 of RICO existed at the time in 1978 when Crown Life terminated Malley-Duff's brokerage general agency contract in Pittsburgh. The admissions, when coupled with Count I of its Complaint, should also be taken to admit that there was, in fact, no conspiracy in existence at that time to violate subsection (a), (b) or (c) of 18 U.S.C. § 1962.

On the other hand, Malley-Duff could argue that its admissions do not concede that there was no such conspiracy in existence at the time an injury was done by an overt act pursuant to the conspiracy. RICO does not give a plaintiff a cause of action under subsection 1962(d) unless there is a conspiracy to violate subsections 1962(a), (b) and (c) *and* the plaintiff is injured in its business or property by an overt act. Although no pattern of racketeering existed when Malley-Duff's brokerage general agency in Pittsburgh was terminated, if the termination was an overt act pursuant to a then existing conspiracy to violate one of the subsections (a), (b), or (c), Malley-Duff may argue that there was a violation of subsection (d) and a cause of action accrued at the time of the injury.[7]

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[7] *Bankers Trust Company v. Feldman*, 65 R.R. 470 (S.D.N.Y. 1986), seems to assume that the victim of the first predicate act in what later became a pattern would have no RICO claim unless the rule on accrual can be distorted by allowing later predicate acts to relate back to an injury done when only one predicate act had occurred. Such distortion is unnecessary, since subsection (d) could cover the case.

It should be pointed out that liability under subsection (d) would exist only if the conspiracy contemplated that a pattern of racketeering activity had or would come into being and through it a violation of the other subsections would occur. But if Mally-Duff now claims it has proof of such a conspriacy, as it alleged in its complaint, a RICO cause of action would have accrued at the time of its injury. If that is true, Malley-Duff's claim under (d) would be barred by the two-year statute of limitations.

The principal damage alleged by Malley-Duff was the termination of the agency. By Malley-Duff's own admission, the only predicate act alleged to precede the termination of the agency was the so-called bogus quota letter of August 19, 1977. Malley-Duff has already sued these Petitioners and others under antitrust and common law tortious interference claims. Just because it does not have a RICO cause of action in connection with the termination of the agency, does not mean that it does not have recourse if it can establish either antitrust or common law grounds for recovery.

III. If Malley-Duff has a RICO cause of action for recovery for its termination injury, the statute of limitations began to run on the date of injury.

Although state law must provide the applicable statute of limitations period for civil RICO causes of action, when the statute of limitations period starts to run is a matter of federal, not state, law. *Rawlings v. Ray*, 312 U.S. 96 (1941). The general federal rule is that a statute of limitations begins to run when a plaintiff knows or should know of his injury.

The great majority of courts that have addressed the issue have held that the general federal rule should apply in

the civil RICO context. In *Bowling v. Founders Title Co.*, 773 F.2d 1175 (11th Cir. 1975), *cert. denied*, ___ U.S. ___, 106 S. Ct. 1516 (1986), for example, the court vacated a jury verdict in favor of two of the plaintiffs under § 1962(c), holding that the complaint was filed later than one year after the plaintiffs had learned of their injury. In *Compton v. Ide*, 732 F.2d 1429 (9th Cir. 1984), the court applied the general rule in affirming the grant of summary judgment on a § 1962(d) claim. The court noted in its opinion that it is not necessary that a plaintiff "have knowledge of all of the details or all of the persons involved in order for his cause of action to accrue." *Id.* at 1433.

In the present case, there is no question that Malley-Duff knew on February 11, 1978, of the injury that it allegedly sustained on that date. The statute of limitations began to run on that date for any civil RICO claim for injury that it may have sustained at that time.

A few courts have taken the position that the statute of limitations starts to run when the plaintiff has knowledge or reason to know of the injury from the last predicate act on which he relies. *Bankers Trust Company v. Feldsman*, 65 B.R. 470 (S.D.N.Y. 1986); *See also, County of Cook v. Berger*, No. 83C 3401 (N.D. Ill. November 24, 1986) (Holding that the limitations period starts to run from the last *overt* act of an alleged civil RICO continuing conspiracy claim.)

The reasoning of courts allied with *Bankers* is misplaced. Although RICO does not require a competitive or "racketeering injury," nor any injury "separate from the harm from the predicate acts," one must, nevertheless, be injured "in his business or property by the conduct constituting the violation." *Sedima*, 105 S. Ct. at 3286. "[T]he

compensible injury necessary is the harm caused by predicate acts sufficiently related to constitute a pattern, for the essence of the violation is the commission of those acts in connection with the conduct of an enterprise. Those acts are, when committed in the circumstances delineated in § 1962(c), 'an activity which RICO was designed to deter'." *Id.* When one is injured in his business or property the limitations period should begin to run on that day. If the injury was not by reason of a pattern of racketeering activity or of an overt act pursuant to a conspiracy to carry out such a pattern, then it could not have been by reason of a violation of § 1962.

Those courts which choose not to apply the general rule have uniformly ignored the critical differences between civil and criminal conspiracies, which differences dictate separate rules as to when the statute of limitations begin to run. The court in *Bankers*, and other courts reaching the same result, have ignored the distinction by relying on *United States v. Field*, 432 F. Supp. 55 (S.D.N.Y. 1977), *aff'd mem.* 578 F.2d 1371 (2nd Cir.), *cert. denied*, 439 U.S. 801 (1978), and other criminal conspiracy cases. In *Field*, the court was concerned in part with the running of the limitations period on an indictment charging a criminal RICO conspiracy. According to *Field*, in a criminal conspiracy, the statute of limitations begins to run anew on the commission of each overt act. *Id.* at 59. This is because, as long as the conspiracy continues, the conspirators become more and more likely to commit an unlawful act. Society in general is deemed injured by the conspiracy even if no substantive laws have been violated. It is the *mens rea* that is thought to injure society. Society retains its right to punish those involved in the conspiracy so long as the

conspiracy continues to make itself manifest through overt acts.

In a civil conspiracy, the injured party and the nature of the injury are different from the societal interest in the criminal statutes. "In the civil case, actual injury is the focal point, not the illegal agreement per se, as is true in the criminal context." *Wells v. Rockefeller*, 728 F.2d 209, 217 (3rd Cir. 1984).[8] The civil conspiracy cause of action is not designed to punish the *mens rea* of the conspirators, but to provide a remedy for the injuries suffered by their acts. *Compton v. Ide*, 732 F.2d 1429, 1433. "Mere continuance of a conspiracy beyond the date when injury or damage occurs does not extend the statute of limitations." *Id.* at 1432. For these reasons, the statute of limitations on civil RICO claims should begin to run on the date of injury, and there is no reason to create an exception to the general rule or to analogize civil RICO claims to criminal conspiracy claims.

Cases such as *Bankers* and *County of Cook* attempt to characterize civil RICO violations as continuing violations or conspiracies in order to justify the rule that the period runs from the last predicate or overt act upon which the plaintiff relies. *Bankers*, for example, relies upon employment discrimination cases to provide the model of the continuing conspiracy exception. It cites *Held v. Gulf Oil Co.*, 684 F.2d 427 (6th Cir. 1982), for the proposition that so long as the last act evidencing the continuing violation falls within the limitation period, courts will provide relief

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[8]In *Wells*, the Third Circuit held that the statute of limitations began to run from the date of injury even where a continuing conspiracy is alleged. It noted that *White v. Bloom*, 621 F.2d 276 (8th Cir. 1980) had held that the statute would run from the last act of a continuing conspiracy. *White v. Bloom*, however, relied on state law contrary to *Rawlings v. Ray*, *supra*.

for all related acts, even those time-barred. *Held*, of course, does not stand for this proposition. What *Held* did was to permit a plaintiff, who claimed she was constructively discharged, to use proof of discriminatory acts committed prior to the limitations period to prove the existence of a continuing violation which caused her to terminate her employment; it did not permit recovery for pre-limitation period injuries. *See, Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971) (stating at page 338: "In the context of a continuing conspiracy to violate the antitrust laws, . . . each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.")[9]

Statute of limitation periods are designed to protect the integrity of the judicial system. "Just determinations of fact can not be made when, because of the passage of time, the memories of witnesses have faded and evidence is lost." *Wilson*, supra. at 1944. This may mean that those accused of wrongdoing may not be held accountable, if the injured party sleeps on his rights. However, the system benefits, and "even wrongdoers are entitled to assume that their sins may be forgotten." *Id.*

If this Court finds that the applicable Pennsylvania statute of limitations period is the two-year period for injury to business, then the present RICO claim for recovery for Malley-Duff's termination injury is time-barred.

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[9]*County of Cook cites Newman v. Wanland*, No. 85C 2265 (N.D. Ill. Mar. 7, 1986), which relied upon a discredited court of appeals decision, namely *Baker v. F&F Investment*, 420 F.2d 1191 (7th Cir. 1970), which followed *Hazeltine Research, Inc. v. Zenith Radio Corp.*, 418 4.2d 21 (7th Cir. 1969), which was reversed by *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321 (1971).

Malley-Duff's termination injury occurred on February 11, 1978. No RICO cause of action was filed within two years of that date.

IV. Even if this Court should hold that the statute of limitations did not start to run until Malley-Duff had knowledge or should have had knowledge of a second predicate act that it believed formed a pattern of racketeering activity, its claim is barred by the applicable two-year statute of limitations.

The RICO Complaint in this action was filed on March 20, 1981. Malley-Duff contends that its alleged termination and law suit injuries were not the product of sporadic activity, but part of a planned course of conduct.

> [T]he instant case does not involve sporadic activity. It involves a well orchestrated scheme—or pattern of activities—to fraudulently take over Crown Life's agencies throughout the northeast, to exploit those agencies for the benefit of the individual defendants and to conceal their activities from discovery.

Malley-Duff Supplemental Brief to the Third Circuit, p. 6.

Malley-Duff was clearly aware of the alleged mail fraud in August of 1977 and its termination in February of 1978. The question arises, when did it learn of the alleged conspiracy or of a second predicate act or acts sufficient to constitute a pattern of racketeering activity?

As stated in Argument II above, it knew that Agency Holding had become the Crown Life general agent in Chicago and in Cleveland at least as early as February 1978.

Malley-Duff became aware of the shredding of documents at least as early as November 21, 1978. (Deposition

of Diane Pariano, November 21, 1978). Her deposition confirms Malley-Duff had knowledge of an alleged second predicate act which it has alleged was an obstruction of justice and which caused it injury. In fact, Mrs. Kenneth Backhus testified in her deposition of December 19, 1978, that she had observed the shredding of documents in the Chicago office of Agency Holding. In addition, Malley-Duff was also aware in December of 1978 of the alleged obstruction of justice involving the hiding of secretary/receptionist Miss Marie Beemsterboer from a United States Marshal—a third predicate act upon which Malley-Duff relies in its RICO claims.

Malley-Duff has also alleged that a defendant caused Diana Pariano to perjure herself in her November, 1978, deposition and these allegations are based on information Malley-Duff possessed prior to her deposition or, at the latest, when Mrs. Backhus was deposed in December, 1978.

Accordingly, Malley-Duff knew more than two years before the Complaint was filed of at least four of the alleged predicate acts upon which it relied in its Complaint to establish a pattern of racketeering. Its RICO claims are barred at least as to its claim of injury due to the termination of its general agency contract and the other alleged acts of racketeering activity of which it had knowledge or should have had knowledge before March 19, 1979.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court adopt the rule that the state statute of limitations applicable to injury to business or property be utilized in all civil RICO claims, that it hold that causes of action for RICO claims accrue at the time of injury and

that it reverse the Third Circuit Court of Appeals in this case and affirm the decision of the District Court as to any injuries to the Respondent which occurred on or before March 19, 1979.

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